the circumstances; and the principal is bound, as against the third party, by the acts of the agent within the scope of his authority as it appears to the third party to be."

In the course of his submission, learned counsel for the appellant cited the case of *Howard* v. *Chapman*[1] and the case of *Leckenby & Anor.* v. *Wolman.*[2] In my view, these two cases are distinguishable from the present case. In *Howard* v. *Chapman*, the agent accepted horse-hair in lieu of money as payment for a quantity of hemp delivered to the purchaser, and it was held that the agent had no authority to make such a contract on the ground, *inter alia*, that his employer was not dealing in horse-hair. Whereas in the instant case, the goods supplied by Tony Lim and subsequently returned to him due to certain defects were in respect of the same or similar office equipment and there was no dispute that the appellant was dealing in such goods. In *Leckenby & Anor.* v. *Wolman*, the plaintiffs claimed for the return of the purchase-price of certain furniture from the defendant on the ground that a salesman in the employment of the defendant had agreed to cancel the contract of sale and that they thought that the salesman was the principal and had authority to cancel the contract. It was held by the court that the salesman had no authority to cancel the contract. In the instant case, the facts were entirely different. All the dealings were conducted through Tony Lim at Klang and not at the appellant's shop in Kuala Lumpur. Further, Tony Lim did not cancel any contract as such. What he did was to accept the return of the defective goods and then supplied the respondent with new ones which was necessary and in the interest of the appellant's business, having regard to the nature of the subject matter of the contract. The appellant had the authority to accept the return of goods sold. Having regard to the wide powers given by the appellant to Tony Lim in all the dealings with the respondent, the appellant had impliedly held him out as having such authority, and the learned magistrate quite rightly held that Tony Lim had given the impression to the respondent that he had the authority to collect the machines, and that it was reasonable to infer that such action was within the apparent scope of Tony Lim's authority. Moreover, if he had no such authority, the appellant would certainly have made immediate denial of such authority in its letter dated October 13, 1970 (see Exhibit D8), but instead it demanded the respondent to supply the company with copies of the acknowledgments executed by Tony Lim, to which the respondent had complied. It was unfortunate in this case that Tony Lim could not be called as a witness. However, having regard to the nature of the contract, the circumstances of Tony Lim's employment and the business of the appellant, I found the learned magistrate did not err in law in holding that Tony Lim had the authority, express or implied, to collect the four machines as servant or agent for or on behalf of the appellant.

The appeal was accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Chin & Fernandez.*

NANYANG DEVELOPMENT (1966) SDN. BHD. v. MALAYSIAN ARMED FORCES CO-OPERATIVE HOUSING SOCIETY LTD.

[F.C. (Suffian, Gill & Ong Hock Sim F.JJ.) May 4, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 1 of 1972]

Practice and Procedure — Attachment before judgment — Intent to obstruct or delay judgment — Debtors Ordinance, 1957, s. 19(1)(c) — Courts of Judicature Act, 1964, ss. 69(4) & 72 — Defect in order — Curable by appellate court.

This was an appeal against the judgment of Mohamed Azmi J. ([1972] 2 M.L.J. 6) in which he dismissed the application of the defendant-appellants to set aside an earlier order made *ex parte* by him, for the attachment before judgment of certain properties of the defendant/appellants. It was argued on appeal that the learned judge erred in law in drawing the inference from the evidence in the case as regards the intent to obstruct or delay the execution of the judgment.

Held, dismissing the appeal: (1) there was ample evidence before the learned judge to justify him making the *ex parte* order which he made on December 3, 1971. That order could only be set aside if it could be shown that the plaintiffs had suppressed any material facts in obtaining it and this had not been shown by the appellants;

(2) the order made was however defective as it provided for an order in the alternative but the appellate court could set right the defect under sections 69(4) and 72 of the Courts of Judicature Act, 1964. The order would be amended by deleting that part of it which relates to the attachment before judgment of a sum of not less than $1 million being part of the proceeds of sale of the defendant's land, so that the attachment before judgment will be confined to the attachment of the lands themselves.

Cases referred to:-

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375, 377.

(2) *Kanshi Ram* v. *Hindustan National Bank Ltd.* A.I.R. 1928 Lahore 376.

(3) *Chandrika Prashad Singh* v. *Hira Lal* A.I.R. 1924 Patna 312.

(4) *Bishamberdas & Co.* v. *Sachoomal Kotoomal* A.I.R. 1941 Sind 178.

(5) *Durga Das Das* v. *Nalin Chandra* A.I.R. 1934 Cal. 694.

(6) *R.* v. *Kensington Income Tax Commissioners* [1917] 1 K.B. 486, 504.

(7) *Golding* v. *Wharton Saltworks Company* [1875-6] 1 Q.B.D. 374.

(8) *Watson* v. *Rodwell* [1876] 3 Ch. 380.

(9) *Evans* v. *Bartlam* [1937] 2 All E.R. 646.

(10) *Grimshaw* v. *Dunbar* [1953] 1 All E.R. 350, 353.

FEDERAL COURT.

Lim Kean Chye (*Wong Soon Foh* with him) for the appellants.

Raja Abdul Aziz bin Addruse (*Ariff Wan Hamzah* with him) for the respondents.

Gill F.J.: This is an appeal from the refusal of Mohamed Azmi J. on December 28, 1971 to set aside his earlier order of December 3, 1971 which he had made on the *ex parte* application of the respondents, who are the plaintiffs in Civil Suit No. 807/1971 in the High Court at Kuala Lumpur, for the attachment before judgment of certain properties of the appellants, the defendants in the suit.

The suit was commenced by a specially indorsed writ issued on September 30, 1971. The claim in the action was for a sum of $1,069,423.35 being the amount alleged to be due to the plaintiffs as on October 1, 1971

on an account kept between the plaintiffs and the defendants.

The writ was served on the defendants on October 1, 1971. They entered appearance on October 8, 1971, which meant that they were required to file in court and deliver to the plaintiffs their statement of defence on or before October 22, 1971. The defendants having failed to deliver their defence by the due date, the plaintiffs by their solicitors' notice dated October 26, 1971 required the defendants' solicitors to deliver their defence within 48 hours thereof. The defendants' solicitors by their letter of October 29, 1971 asked for extension of time until November 7, 1971 to file their defence, and then by their letter of November 4, 1971 asked the plaintiffs' solicitors for further and better particulars of the statement of claim and for further extension of time to deliver their defence until 7 days after the delivery of such particulars. The particulars asked for were delivered on November 16, 1971. No defence having been delivered to them by November 30, 1971, the plaintiffs' solicitors on that day served a further notice on the defendants' solicitors requiring them to deliver their statement of defence within 48 hours.

A statement of defence had in fact been filed in court on November 23, 1971 but it was not delivered to the plaintiffs until December 4, 1971. In the meantime, on December 2, 1971 the plaintiffs had taken out an *ex parte* summons in chambers for an order —

(a) that a sum of not less than $1,100,000.00 being part of the proceeds of sale of certain lands by the defendant to Sharikat Kemajuan Perumahan Pegawai2 Kerajaan Sdn. Berhad and payable by the said Sharikat to the defendant upon execution of an agreement relating to the sale, be attached by the appropriate officer of this Court as soon as the said agreement is executed by the said Sharikat and the defendant and before payment of such proceeds by the said Sharikat to the defendant, and

(b) in the alternative, that if the sale be not proceded with, there be attached by the appropriate officer the properties of the defendant specified in the Schedule annexed hereto,

as a pledge or surety to answer the just demand of the plaintiffs until the trial of the action herein and satisfaction of any judgment that may be made against the defendants in relation to such action. In other words, the plaintiffs asked for attachment of the defendants' properties before judgment.

The summons in chambers was supported by a lengthy affidavit of the chairman of the plaintiff society, Enche Abu Bakar Samad bin Mohd. Noor, sworn to on December 1, 1971, verifying the facts in the statement of claim and stating his belief that the plaintiff society had a good cause of action against the defendants.

The facts set out in the statement of claim, as verified by the affidavit of the plaintiff society's chairman, may be summarised as follows: —

(a) By an agreement dated March 10, 1966 the plaintiff society agreed to purchase from the defendants (then incorporated under the name of "Gombak Gardens Ltd.") a specified number of dwelling houses.

(b) Under a note of an understanding signed by the representatives of the parties at or about the time of the said agreement, the obligation of the plaintiff society was to be limited to such number of houses as were actually booked by its members.

(c) In 1967 the plaintiffs obtained from the Federal Government a loan of $2.5 million on the security of 39 building lots which had been transferred to them by the defendants for that purpose. It was expressly agreed between the parties that the said 39 lots were not to be treated as having been sold to the plaintiff society, and that the defendants were to accept a retransfer thereof upon settlement of the account between the parties.

(d) By an arrangement the plaintiffs made available to the defendants moneys in excess of the actual sum due to the defendants on the sale of dwelling houses under the agreement. The defendants were at liberty to deduct from such excess moneys all such sums as became due to them from time to time on subsequent sale of dwelling houses, but they were to pay interest at 6½% *per annum* on all moneys in their hands from time to time in excess of what was due to them.

(e) The plaintiff society from time to time placed orders with the defendants for the dwelling houses booked by its members. As on May 31, 1967 the amount of the plaintiff society's moneys held by the defendants under the aforesaid arrangement was $1,186,466.86. This was acknowledged by the defendants by their letter dated September 1, 1967 (exhibited as "ABS 4" to the Chairman's affidavit).

(f) All dwelling houses booked by members of the plaintiff society were completed by the defendants and handed over to the plaintiff society by October 1, 1969, and no further booking of houses was received by the plaintiff society from its members after that date.

(g) By their letter dated April 5, 1971 (exhibited as "ABS 5" to the affidavit) the plaintiffs' solicitors informed the defendants' solicitors that their clients proposed to close their accounts with the defendants and that there was then due from the defendants to the plaintiffs a sum of $1,036,282.72 as per the statement attached. The letter went on to ask for expeditious payment of that sum to enable the plaintiffs to redeem from the Government and to retransfer to the defendants the 39 lots which had been made available by the defendants and charged to the Government as security for the loan obtained by them.

The chairman's affidavit went on to point out that —

(a) there was lack of response on the part of the defendants to the plaintiffs' request for payment of the amount due;

(b) the total amount claimed by the plaintiff society in the writ was a matter of calculation as set out in the accounts rendered;

(c) the defendants by their letter of November 5, 1971 (exhibited as "ABS 11" to the affidavit) were attempting to repudiate the agreements between themselves and the plaintiff society by their contention that the plaintiff society placed orders for the construction of dwelling houses on the 39 building lots which had been transferred to the plaintiffs so as to enable them to offer such lots as security to Government for a loan;

(d) the defendants' application for particulars was frivolous and designed to delay the process of law because such particulars were well within their knowledge;

(e) the defendants had on July 9, 1971 sold a substantial portion of their remaining properties in Bungsar Park to Sharikat Kemajuan Perumahan Pegawai2 Kerajaan Sendirian Berhad, and they were presently finalising arrangements to sell and transfer a substantial portion of their lands in Ampang and Gombak to the same Sharikat at the price of $1.30 per square foot; and

(f) the defendants behaved in a dilatory manner in response to the action instituted against them so as to gain time in order to dispose of their properties with intent to delay the execution of any judgment which may be made against them in this action.

On the application for attachment before judgment coming on for hearing on December 3, 1971, Mohamed Azmi J. made an order on the same day in terms of the summons in chambers. It was this order which was subsequently sought to be set aside.

As I have already said, the defendants filed their statement of defence on November 23, 1971, but did not deliver it to the plaintiffs until December 4, 1971. In it they aver that the agreements on which the plaintiffs are suing were subsequently varied by the parties at two meetings held on or about March 17, 1970 and May 20, 1970, and that under the terms of such variations as contained in the minutes of the meetings the plaintiffs were to purchase from the defendants the balance of 39 vacant lots at Gombak at $1.80 per square foot and to enter into an agreement with the defendants for the construction of 33 detached and 6 semi-detached houses on the 39 lots. They go on to say that taking into account the sum of $444,000 as the cost of those lots, the sum of $40,442.19 as interest on late payments and a sum of $344,437.16 for various other charges such as legal fees, water supply, electricity supply, maintenance of roads and drains and cost of alterations and additions to houses, the plaintiffs are in fact indebted to the defendants in the sum of $11,068.16. They have also counterclaimed for general damages by reason of the plaintiffs' failure to enter into an agreement for the construction of houses on the 39 lots, and there is a further counterclaim in the sum of $300,184.20 as damages by reason of the plaintiffs' breach of agreement to purchase 43 lots which, they allege, they had to sell at a loss to the extent of the amount claimed by way of damages.

The plaintiffs filed their reply and defence to counterclaim on December 15, 1971. They deny that the agreements reached at the meetings of March 17, 1970 and May 25, 1970 are as alleged by the defendants, reiterating that the 39 vacant lots at Gombak were transferred to them for the sole purpose of enabling them to furnish sufficient security for raising a loan from the Federal Government. As regards the 43 lots in respect of which there is a counterclaim for damages, the plaintiffs say that the defendants had agreed that they would dispose of those lots if they were not booked by members of the plaintiff society, and that at no time prior to the date of the plaintiffs' claim had the defendants required the plaintiffs to purchase the said 43 lots. They state further that the defendants' offer to sell the said 43 lots to the Sharikat Kemajuan Perumahan Pegawai2 Kerajaan Sendirian Berhad was made well before November 7, 1971 when the purported notice as mentioned in paragraph 14 of the counterclaim requiring the plaintiffs to complete the purchase of the said 43 lots was given to the plaintiffs for the first time, and that the said 43 lots had in fact been sold by the defendants to the Sharikat prior to the date of the filing of the counterclaim.

The defendants' application for an order that the order for attachment before judgment dated November 3, 1971 be set aside was made by way of summons in chambers filed on December 18, 1971. It was supported by the affidavit of Wong Choon Yah, the manager of the defendant company. The affidavit stated that the particulars asked for through the defendants' solicitors were proper and relevant, that it was part of the defendants' business to buy and sell land, that they were still the registered owners of several other pieces of land worth $1,587,248.46, that the plaintiffs' solicitors were well aware of the proposed sale of the defendants' lands as they were acting for the purchasers, that the defendants were reluctant to pay because they denied liability and had a good counterclaim against the plaintiffs and that the plaintiffs did not have a good cause of action as evidenced by their failure to avail themselves of the provisions of Order 14 of the Rules of the Supreme Court. The affidavit concluded with a denial that the defendants had any intent or had taken or done any act with intent to obstruct or delay the execution of any judgment which may be made against them, and that the plaintiffs had failed to make out a case for an order of attachment before judgment under section 19(1) of the Debtors Ordinance, 1957. There was a supplementary affidavit by Wong Choon Yah to say that in 1968 the defendants had sold 82 lots of developed land at Ampang Jaya to Modern Homes Sendirian Berhad and that in doing so the defendants were engaged in their ordinary course of business as provided for in their memorandum of association.

The chairman of the plaintiff society filed a further affidavit to counter the affidavit filed by Wong Choon Yah, in which he stated that the defendants' counterclaim was for amounts purported to be due from the plaintiff society to the defendants under a separate and distinct agreement entered into between the plaintiff society and the defendants with respect to lands in Ampang, which amounts had been paid in full by the plaintiff society under a final account prepared by the defendants, and that the rendering of such final accounts was admitted by the defendants in their statement of defence in civil action No. 766 of 1971 in the special sessions court, Kuala Lumpur, so that the affidavit filed on behalf of the defendants by Wong Choon Yah misrepresented facts or deliberately withheld information. As regards the other lands of which the defendants claimed to be still the proprietors, the chairman said that they were all charged as securities for loans obtained by the defendants. And he repeated the charge that the defendants had been deliberately delaying these proceedings in order to gain time to complete the sale of their lands to the Sharikat.

The defendants' application to have the *ex parte* order set aside came on for hearing on December 28, 1971. Upon considering the further evidence produced before him and having heard arguments by counsel for both parties, the learned judge dismissed the application on the same day. It is against the refusal of that application that this appeal has been brought.

The learned judge has stated in his grounds of judgment that in making the *ex parte* order he was satisfied from the supporting affidavit that the plaintiffs had a good cause of action and that the defendants with intent to obstruct or delay any judgment that might be entered against them were making away with or handing over certain immovable properties in the mukims of Ampang and Setapak to the said Sharikat.

As regards the application to set aside the *ex parte* order, he points out that it was conceded by counsel for the defendants that the plaintiffs had a good cause of action. It was also not in dispute that at the time when the *ex parte* order was made the defendants were in the final stages of executing an agree-

ment with the said Sharikat for the sale of 219 lots of land. He goes on to say that the only issue before him was whether there was sufficient evidence to show that in trying to dispose of the 219 lots of land the defendants had the intention to obstruct or delay the execution of any judgment which might be made against them.

In his view such intention could be proved either by direct evidence or by inference from proven facts. In this connection, in dealing with the words "with intent to obstruct or delay" in section 19(1)(c) of the Debtors Ordinance, 1957 he cites the following passage from the judgment of Thomson C.J. (as he then was) in *Kepong Prospecting Ltd.* v. *Schmidt*: [1]

"Here I do not wish to appear to be unduly technical. I entirely agree with the argument of Enche Ramani that this requirement is sufficiently fulfilled if the applicant satisfies the Court of the existence of facts from which the inference should be drawn that there has been the required intent."

He then arrives at his conclusion in the following words: —

"In the present case, I find there are proven facts, the cumulative effect of which gives rise to the irresistible inference that the defendant is making away with its immovable property with intent to obstruct or delay the execution of any judgment which may be made against it."

In his reasons for that conclusion the judge held, first, that the defendants having admitted the agreements and the memorandum of understanding of March 10, 1966 under which the liability of the plaintiffs was limited only to such number of houses as were actually booked by the members of the plaintiff society, their attitude in asking for further particulars in respect of the memorandum of understanding was to delay the just demand of the plaintiffs as long as possible so as to allow the sale of the 219 lots to the Sharikat to go through. Secondly, the judge held that the defendants' request for particulars as regards the sum of $1,729,233.14 was made merely for the purpose of delaying the just payment to the plaintiffs having regard to the fact that this figure could easily be obtained by adding certain figures in the defendants' own letter of September 1, 1967 (exhibit "ABS 4" in Abu Bakar's affidavit). Thirdly, he held that the fact that negotiation between the defendants and the Sharikat for the disposal of the 219 lots was commenced after the filing of the writ and the dilatory manner in which the defendants responded to the plaintiffs' claim indicated their intent to obstruct or delay as envisaged under section 19(1)(c) of the Debtors Ordinance, 1957. Fourthly, he held that the sale of 43 lots of land at a cheap price of $1.30 per square foot instead of the normal market price of $2.50, as was apparent from paragraph 15 of the statement of defence, was an additional circumstance to be considered as to the intent of the defendants in trying to dispose of the subject matter of the attachment. Finally, he held that in view of the fact that all the other properties of the defendants were in fact charged and the further fact that as the defendants' liabilities as shown in their balance sheet for the year ended March 31, 1971 exceeded their assets, their financial position was not as rosy as they would like the court to believe.

Having stated those reasons the learned judge in the concluding paragraph of his grounds of judgment says:

"Taking the above additional circumstance into consideration, and after considering their cumulative effect, I am more than satisfied, on the balance of probabilities, that the defendant has been deliberately delaying the substantive proceedings in order to give time to complete the sale of its lands. On the evidence before me, I am convinced that the defendant is disposing of its property *en bloc* to the said Sharikat with intent to obstruct or delay the execution of any judgment which the plaintiff may subsequently obtain in its favour. Under the circumstances, I have no alternative but to dismiss the application of the defendant to set aside the order for attachment before judgment dated December 3, 1971."

It is clear that the order for attachment before judgment was made under section 19(1)(c) which reads as follows: —

"If it is shown to the satisfaction of the Court, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and —

(a) ...

(b) ...

(c) that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property;

the Court may order that the property of the defendant, or any part thereof, be forthwith seized or attached by the appropriate officer as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant; but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt:"

In arguing the appeal, counsel for the appellants started off by reading the above provision of the Debtors Ordinance, 1957, emphasizing the words "with intent to obstruct", "delay the execution of any judgment", "has removed or is about to remove", "has concealed or is concealing" and "making away with or handing over to others". He pointed out that here was a case of a proposed sale by the defendants of some of their properties, and that there was nothing fraudulent or secretive about it and the solicitors for the plaintiffs in this case were in fact acting for the purchaser. Moreover, the appellants were not disposing of all their lands. He then submitted that section 19 of the Ordinance could not cover a sale and that the learned judge in the course of his judgment had used the words "dispose of "which are not to be found in the section. In other words, it was said that the words "making away with" do not carry the same meaning as the words "dispose of". In my judgment this argument is as frivolous as the request of the plaintiffs for particulars, because the *Shorter Oxford* English Dictionary, 3rd edition, volume 1, at page 1192 says that "make away with" means "dispose of".

It was next argued on behalf of the appellants that the court has to scrutinize the application before an *ex parte* order for attachment of the defendants' properties before judgment can be made. In this connection, he cited the Indian cases of *Kanshi Ram* v. *Hindustan National Bank, Ltd.*,[2] *Chandrika Prashad Singh* v. *Hira Lal*[3] and *Bishamberdas & Co.* v. *Sachoomal Kotoomal*[4] in support of the proposition that the jurisdiction of courts in attaching property before judgment is of an extraordinary nature and must be spar-

ingly exercised, and that the power should be exercised only when the court is satisfied not only that the defendant is about to dispose of his property, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of his victory. He then cited the case of *Durga Das Das* v. *Nalin Chandra*[5] in support of his argument that in order to get the order for attachment before judgment the plaintiff must make out the sort of *prima facie* case which is required to be made out before an order for an injunction can be issued. Indeed, his major ground of appeal rests on this proposition.

As regards the circumstances under which a court will refuse to make an order for injunction he cited the following passage from the judgment of Lord Cozens-Hardy, M.R. in *R.* v. *Kensington Income Tax Commissioner*: [6]

"It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority. *Dalglish* v. *Jarvie*, which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: 'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.' Then there is an observation in the course of the argument by Lord Langdale: 'It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved.' That is to say he would not decide upon the merits, but said that if an applicant does not act with *uberrima fides* and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application."

On the strength of the authorities which I have just mentioned, counsel for the appellants argued that in making their application for attachment before judgment the plaintiffs were guilty of suppression of some very material facts. In this connection, he referred to the following extract from the minutes of the meeting between the representatives of the parties on May 20, 1970, which was exhibited as "ABS 2" to the affidavit of the chairman of the plaintiff society:

"Mr. Y.T. Cheah agreed to pay 6½% interest in respect of all amount over paid in advance, particularly after the $2.5 million payment made on 14th February, 1967 based on the following calculations:—

(a) During the 3 months Banker's Guarantee period i.e. from 15th February 1967 to 20th May, 1967.
(b) On balance left over after deducting the price of 117 Terrace Houses and 6 Detached Houses completed on 31st December, 1967 interest due with effect from 1st January, 1968.
(c) On balance left over after deducting the price of 14 Shop Houses which was completed on 31st August, 1968 interest due with effect from 1st September, 1968.
(d) On balance left over after deducting the price of another 6 Detached Houses completed on 31st March 1969 and the price of remaining 39 vacant lots, the interest due with effect from 1st April, 1969."

He then went on to argue that it was very material that the agreement between the parties made in 1970 should have been revealed.

The short answer to this argument is that the plaintiffs had in fact referred to the only sort of agreement which the parties made in 1970 as set out in the notes of the meeting on May 20, 1970, and the defendants had produced no agreement or agreements to the contrary. Counsel for the appellants kept on harping on items (c) and (d) of the extract, which I have quoted above, when there is nothing in them to indicate that anything had been suppressed. Indeed, all the houses mentioned under items (b), (c) and (d) were clearly shown in the statement of account which was sent by the plaintiffs' solicitors to the defendants' solicitors with their letter of April 5, 1971. What the plaintiffs failed to reveal were the legal fees, costs of water supply and electricity supply, cost of maintenance of roads and drains and cost of alterations and additions to houses which were set out in the defendants' statement of claim. How could the plaintiffs reveal those charges when they were never informed about them? Why did the defendants not write back to the plaintiffs about these charges when they received the final account from the plaintiffs with their letter of April 5, 1971? The plaintiffs certainly were not aware of those charges, although it can be said against them that they should have anticipated them, but they could surely not take any steps to pay off those charges or have them set off against their claim until they were made known to them. The truth is that the plaintiffs, in support of their application for attachment before judgment, put every material fact within their knowledge before the court, so that it cannot be said that they did not act with *uberrima fides*.

A general ground of appeal is that the plaintiffs had not made out a *prima facie* case on the affidavit of the chairman. This in fact is the substance of the first six grounds set out in the memorandum of appeal. It is said in connection with these grounds that the learned judge erred in law in drawing the inference from the evidence available before him as regards the intent to obstruct or delay the execution of any judgment. I have set out above the reasons of the learned judge for his conclusion on the cumulative effect of the various inferences which he drew from the evidence produced before him. I must say with respect to the learned judge that his conclusions are more than borne out by the evidence which he had before him.

In my judgment, there was ample evidence before the learned judge to justify his making the *ex parte* order which he made on December 3, 1971. That order could only be set aside if it could be shown that the plaintiffs have suppressed any material facts in obtaining it. As I have already said, they suppressed nothing which was within their knowledge at the time of the application. The various charges to which the defendants are entitled, in respect of which they are alleged to have been guilty of suppression, were then known only to the defendants who had chosen not to inform the plaintiffs about them when they received the final accounts which were never questioned until the filing of the statement of defence.

The position as regards the 39 lots in respect of which the defendants not only claimed a set off but have also set up a counterclaim by way of damages, is abundantly clear from the pleadings and the affi-

davits. Whatever has been urged on behalf of the appellants in this court, was urged before the learned judge who has stated his reasons for refusing to set aside the order. If the learned judge rightly appreciated the facts and applied to those facts the true principles, that was a sound exercise of judicial direction. The mere fact that this court might have taken a different view is not a sufficient ground for interference with that discretion. If any authority is required for that proposition it is to be found in the case of *Durga Das Das* v. *Nalin Chandra,*[5] a case on which the defendants are themselves relying in support of their appeal. Even in the case of *Bishamberdas & Co.* v. *Sachoomal Kotoomal,*[4] another case on which the appellants seek to rely, it was held that where the lower court has correctly stated and appreciated the most material facts in the case, and has not misunderstood or misapplied the law, and has deliberately exercised a discretion entrusted to it by law, the appellate court will not interfere. The same principle is to to be found in *Golding* v. *Wharton Saltworks Company,*[7] *Watson* v. *Rodwell,*[8] and *Evans* v. *Bartlam.*[9] To use the words of Jenkins, L.J. in *Grimshaw* v. *Dunbar,*[10] "did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations?" I do not think so. This court, therefore, cannot interfere.

The only other point for me to consider is whether, as alleged by the appellants, the order made on December 3, 1971 is defective in that it is an order which provides for an order in the alternative. There is perhaps something in what the appellants alleged, but this is a defect which this court has the power to set right under sections 69(4) and 72 of the Courts of Judicature Act, 1964. The order made therefore is amended by deleting that part of it which relates to the attachment before judgment of a sum of not less than $1 million being part of the proceeds of sale of the defendants' lands specified in the schedule annexed to the order, so that the attachment before judgment will be confined to the attachment of the lands themselves. As there is likely to be some difficulty in the drawing up of the order I would direct that the operative part of the order do read as follows: —

"IT IS ORDERED that the defendants be and are hereby, for a period commencing with the date of registration of this Order under the provisions of the National Land Code, and ending with the expiry of six months from the date of this Order, prohibited and restrained from transferring or charging or leasing the immovable property specified in the schedule hereunder.

"AND IT IS FURTHER ORDERED that the appropriate land authority do give effect to this Order by registering it as a prohibitory order under the provisions of the National Land Code."

In the result the appeal is dismissed but the order of attachment before judgment will be amended as I have indicated above. The appellants must pay the costs of the appeal.

Suffian and **Ong Hock Sim F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Chooi & Co.; Rithauddeen & Aziz.*

WONG LEE SING v. MANSOR

[A.C.J. (Sharma J.) May 17, 1972]

[Ipoh — Civil Appeal No. 5 of 1972]

Contract — Void agreement — Sale of land — Vendor in no position to execute transfer to purchaser — Payment of deposit — Unjust enrichment — Refund — Contracts (Malay States) Ordinance, 1950, s. 66.

Land Laws — Transfer — Vendor having no title to property — Deposit paid — Void agreement.

The respondent/defendant had entered into an agreement dated April 12, 1971, with the appellant/plaintiff for the sale of a piece of land. The respondent represented to the appellant that he was in a position to transfer the land to him. However, the appellant subsequently discovered that the respondent was in no position to do so and he had no title to the land.

The respondent had signed the agreement as a 'vendor' and received a 'deposit' of $1,200 for the land which was priced at $4,500. He stated in court that he was only acting as a broker. It was stated by a witness that the piece of land sold stood in the name of one Ismail bin Yusof as on April 12, 1971, and that there was a restriction imposed upon the said land in that no transactions could be entertained without the prior written permission of the Mentri Besar.

Held, allowing the appeal: (1) section 66 of the Contracts Ordinance, 1950 applied to the circumstances of this case, in that there was unjust enrichment. The respondent was at no time able to execute the transfer in favour of the appellant, and there was no suggestion that the said Ismail was ready and willing to execute the transfer;

(2) therefore, the order of the learned magistrate must be set aside and that the sum of $1,200 be refunded to the appellant, with costs.

MAGISTRATE'S CIVIL APPEAL.

K. K. Yeow for the appellant.

Vincent Ng for the respondent.

Sharma J. (delivering oral judgment): The plaintiff and the defendant entered into two separate agreements on 13th March, 1971 and 12th April, 1971 respectively. The first agreement was in respect of two pieces of land namely, Lot No. 11845 and Lot No. 11873 at Raja Hitam while the second agreement was only in respect of Lot No. 11873. Section 63 of the Contracts Ordinance, 1950 deals with agreements of this type. The effect of that was that the only agreement that had to be performed was the second agreement dated 12th April, 1971 which is Exhibit P1 in this case. The defendant signed this agreement as a "vendor" and received a "deposit" of $1,200 "for the purchase price" of Lot No. 11873 from the plaintiff. The price of the land is given in Exhibit P1 as $4,500.

In paragraphs 3 and 4 of the amended statement of claim, the plaintiff referred to the agreement (Exhibit P1) and the duty of the defendant to sell the land in question for $4,500 as well as his duty to execute a valid and registrable transfer in respect of the said land in favour of the plaintiff. his nominee or nominees. There was no traverse to paragraph 4 of the amended statement of claim but in paragraph 2 of the defence the defendant did admit having received a sum of $1,200 "for the sale of only one piece of land for the sum of $4,500". In paragraph 4 of the defence the defendant denied having "refused to do the necessary land transaction in favour of the